No.

203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 203

UNION OIL COMPANY OF CALIFORNIA and LOUISIANA LAND AND EXPLORATION COMPANY, *Petitioners*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONERS IN OPPOSITION TO THE MOTION OF LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, THE UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY TO BE ADDED AS PARTIES RESPONDENT AND TO CORRECT AND AMEND TITLES AND CAPTIONS

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Union Oil Company of California and Louisiana Land and Exploration Company, petitioners herein, respectfully urge this Honorable Court to deny the motion filed in the above-entitled matter for the reasons that the motion has no basis for grant, it having no substance as a matter of law. Additionally, such motion is improperly filed in contravention to the Rules of this Court.

I.

Movants Are Not Proper Parties Respondent Here

The decision below pertinent to the judgment to which petition for writ of certiorari is taken, is reported at 255 F.2d 548. The decision below directs respondent Federal Power Commission to reopen proceedings before it to permit petitioners to adduce evidence in support of their cause.

Movants are large public utility companies engaged in the distribution and resale for profit of natural gas. Movants are not privies to respondent Federal Power Commission in law or representation. Moreover, the judgment below does not define any rights of movants adverse to their respective interests, nor have movants' positions been disturbed by final adjudication. Indeed, the decision of the lower court properly so, is silent as to these rights. The decision alludes to their positions only to the extent that movants here, as intervenors below, constitute the majority of the group which well may be unjustly enriched in the circumstances, to the detriment of petitioners. The degree of enrichment is in the order of the $10,000,000 sum asserted in the motion (M. 3).[1]

II.

Movants Assume Inadequacy of Respondent Federal Power Commission

The respondent Federal Power Commission is the sole party to this proceeding which is required to act under the direction of the lower court. The direction to it to reopen the proceedings cannot work to

[1] "M—" refers to intervenors' motion here.
"C.P.—" refers to intervenors' cross-petition and petition.

the detriment of the public interest. This is clearly evident by the refusal of the Federal Power Commission to seek review before this Court in the premises. Such Commission is exclusively charged with protection of the consumers' interests.

Notwithstanding, movants found their position as asserted representatives of the interests of consumers, all in derogation of the expressed intent of the Congress. Natural Gas Act, Section 1, (52 Stat. 821 (1938); 15 U.S.C. § 717a). Their claim of right to be included and arranged as respondents is no more substantial than this asserted interest, which is devoid of authority and rife with pretense. Movants may not arrogate to themselves the legislatively delegated function of the Federal Power Commission. Neither can movants presume that alone the Federal Power Commission is not competent ". . . to protect consumers against exploitation at the hands of natural gas companies." (M.5)

III.

Movants Have Heretofore Presented Their Case

Movants, as intervenors below, have exercised the privilege of petition for review of the judgments of the lower court (M.2). This filing in Nos. 197 and 201, October Term, 1958 is entitled "Cross-Petition and Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit." It is collectively directed to four separate judgments including those two judgments pertinent to petitioners' cause. Petitioners filed subsequent thereto in No. 203, October Term, 1958.

The respective times of filing of movants and petitioners pleadings speak for themselves. One precedes the other.

A cross-petition is peculiar to a party respondent, not to a party petitioner. *Morley Const. Co.* v. *Maryland Casualty Co.*, 300 U.S. 185. Absent status of parties respondent and the filing of a cross-appeal, movants are sharply confined to the questions raised in their petition in Nos. 197 and 201 insofar as that petition seeks review of the particular judgments handed down below in the instance of petitioners. As this Court reaffirmed in the *Morley* case *supra* at 191:

> "What he (appellee) may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.'" (Insert added)

Movants' cross-petition cannot be seen to be directed to petitioners' writ for certiorari. The former preceded the latter.

The contrary is plainly movants' purpose here, for in petitioning for review in their own behalf, it must be conclusively presumed that these movants brought before this Court all of the questions which were regarded as worthy in support of the grant sought. No other questions advanced at a subsequent untimely date will be entertained. Notwithstanding, what movants now propose is leave to smuggle in additional

issues not timely presented in their petition before the Court.[2]

IV.

Movants' Position Is Fatally Inconsistent

Movants assert that in the lower court "they successfully contested the points presented in the petitions herein" (M.2) Yet they contend in the Cross-Petition and Petition that the court below erred in all matters significant in that it "arrogated to itself the discretion vested in the FPC and, in balancing the interests, it tipped the scales" against their favor. (C.P.9)

If movants succeeded in the court below as they maintain, there is no standing to appeal. *Public Service Commission* v. *Brashear Freight Lines*, 306 U.S. 204, 206; *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645. If movants are dissatisfied with the judgments there rendered, the exercise of the privilege of petition has exhausted their timely and proper mode of recourse. *International Union* v. *Eagle-Picher Co.*, 325 U.S. 335. Both positions cannot be maintained at once, together with that of respondent in support of the judgments to which they take appeal.

The thrust of the motion is to convert the voluntary role of intervenor into the legal status of respondent. The position is untenable. The motion is defective.

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[2] Mr. Justice Jackson in announcing the judgment in *Irvine* v. *California*, 347 U.S. 128, 129, commented on this practice thusly:

> We granted certiorari on a petition which tendered four questions. However, petitioner's counsel has now presented two additional questions . . . Neither of these was mentioned in the petition. We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid settled, frivolous or state law questions. We do not take up the questions numbered 3 and 6 of petitioner's brief because they are improperly presented

CONCLUSION

For the foregoing reasons this motion should be denied.

Respectfully submitted,

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